

WITH THE JURY!

WHAT THEIR VERDICT WILL BE
CAN ONLY BE CONJECTURED.

A REMARKABLE CASE.

GEN. A. H. COFFROTH PLEADS WITH
THE JURY ON BEHALF OF THE
PRISONERS FOR MORE THAN
THREE HOURS.

HON. JOHN CESSNA CLOSES THE CASE FOR THE
COMMONWEALTH IN THE MOST POWERFUL
ARGUMENT EVER HEARD IN A SOMERSET
COUNTY COURT.

A WONDERFUL SPEECH BY THE "GRAND
OLD MAN."

AN ABLE CHARGE BY A LEARNED
JUDGE.

The Charge Conceded on All
Sides to Have Been Fair
and Impartial.

A Verdict Expected This Morning.

Promptly at 8:30 yesterday morning the Court resumed the trial of the now famous Umberger case. All witnesses in the case having been discharged the day before in time to start for their homes, the attendance was less than it has been at any time since the case was called. The prisoners were in their accustomed seats immediately in front of the bench and facing the jury. Their appearance did not indicate that they had had a refreshing night's sleep, and their greeting to their wives and aged parents was silent and sad. Their counsel, Messrs. Coffroth, Ruppel and Koonz all showed signs of being fatigued after more than a week of ceaseless work and worry.

At the Commonwealth's table sat Messrs. Riesecker, Kooser and Cessna; the younger men looking tired and exhausted, showing the great strain they had been under, but "your Uncle John" was looking fresh, vigorous and fully prepared for the great effort he was to make during the day.

A. H. Coffroth, Esq., commenced his argument to the jury at the opening of the court and consumed the entire morning session; his argument was forcible, logical and argumentative and was listened to with marked attention by the jury and the vast audience. He spoke for three hours and 32 minutes. John Cessna, Esq., made the closing argument for the Commonwealth. He spoke for two hours and thirty-five minutes and his speech was the most powerful marshaling of facts ever heard in a Somerset county court. It was a speech befitting the high reputation of Mr. Cessna and the importance of the cause for which he pleaded. The court room was crowded with friends and admirers of the justly celebrated lawyer, all of whom were eager to hear him in one of the greatest efforts of his long and busy life. They were more than satisfied. It was a grand speech by a grand old man.

JUDGE BAKER'S CHARGE TO THE JURY.
Gentlemen of the Jury:

A long and necessarily tedious trial is nearing its close, and soon the whole responsibility of a true verdict will rest on you. You have patiently and with commendable attention listened to the testimony as detailed by the witnesses of both the Commonwealth and the prisoners at the bar, and have, I am sure, given due consideration to the able argument of the learned counsel on the material facts in evidence.

The facts you take from the evidence as given by the witnesses on the stand. The arguments of the counsel do not make facts; but they are a discussion of the evidence, and of the materiality and credibility of it as bearing upon the guilt or innocence of the prisoners, and are entitled to due consideration; nevertheless, the jury cannot surrender its own judgment fairly formed on all the material facts and adopt the views of counsel. The solemnity with which you were chosen from the body of the qualified electors of the county and impaneled as able, sober, intelligent and judicious men, may well inspire you with awe, in view of the great responsibility put upon you.

You were sworn to well and truly try and true deliverance make between the Commonwealth of Pennsylvania, and the prisoners you have in charge, and a true verdict give according to the law and the evidence. You are not to simply find a verdict, but your duty is to find a true verdict according to the law and evidence.

The law, you receive from the Court, and as to it the Judge is responsible and alone responsible if you act upon the law as he gives it to you.

The evidence is wholly for your consideration, and from the material evidence in the case, as given by credible witnesses, you are to find the facts, and

you alone are responsible for a true and faithful finding of the facts. I repeat, your duty is to find a verdict on the law and the evidence produced in the case. You are not responsible for the law laid down, nor for the facts established by the testimony. If the evidence lead the jury, in the exercise of a sound judgment, to a verdict of guilty there it is your duty to go without stopping to inquire what consequences follow. You, as jurors, have nothing to do with the consequences, and the fear of any possible consequences should not for a moment mislead you to rendering a verdict which your judgment does not approve. In like manner, if the law and the facts lead you in the exercise of a sound judgment to a verdict of not guilty, there it will be your duty to go, no matter what consequences follow. You should arrive at a conclusion, as your oath implies, on all the evidence in the case.

Grave and arduous as your duties seem, the task of finding a true verdict from the evidence under the law as given you, is not a difficult one, if you will constantly keep in mind that you must arrive at any conclusion you come to, by a due and careful consideration of the evidence in the case under such instructions as; to the law as have been given you, free and unaffected by public clamor, private sympathy or feeling, and in total disregard of anything you have heard or read in or out of court before you were sworn as jurors in this case, and that you act as judicious men without fear, favor or affection, looking nowhere but to the law and the evidence. For on these and these alone can a true verdict be based.

To find a verdict otherwise than on the law and the evidence would be a verdict indeed, but your consciences would not be easy. Looked upon in a proper light, the task imposed upon jurors is not so severe. The jury heard such witnesses as the Court deemed competent. Endeavor to remember what they said; observe the witnesses on the stand—their demeanor and manner of testifying, and whether candid or biased. Observe whether their statements are consistent or contradictory; whether contradicted in material matters by others, and whether they have been assailed or their credibility impeached; and then, looking at the witnesses, including the prisoners as witnesses, their interest in the issue, their testimony and manner on the stand, and the consistency of it, the jury determines the amount of credibility that should be given to each witness.

Then, giving due consideration to the testimony of all credible witnesses for and against the prisoners, and due regard to the discussion of the material evidence, the jury find what are the facts proven, and having found the facts, they consider them in connection with the law as laid down by the Court, and find a verdict in accordance with the law and evidence. If the juror has been careful to observe the evidence and the law, the result or conclusion he arrives at should not disturb him, whatever conclusion reasonable, naturally, fairly and truly follows from the law and the proven facts should be the verdict, whether that be a verdict of guilty or not guilty. Peace of conscience would only be disturbed by finding a verdict contrary to, or in defiance of, the law and the evidence. The verdict, whatever it may be, should be found upon due and careful consideration of all the evidence in the light of the law laid down, and should be entirely free from the emotions of fear, favor, affection, sympathy, bias, prejudice, hatred, ill-feeling or revenge, and should be in total disregard of public sentiment or feeling.

A human life has been taken. Herman Umberger, a former citizen of this county, is no more. He was suddenly taken off without warning by persons, whoever they were, that did not fear God, but openly and boldly served the devil and imbued their hands in his blood at the hazard of their souls. Sad as is everything connected with that death, we must not let our sympathy for the bereaved ones, pity for the dead or indignation against the felons, sway us from the clear path of duty. Our duty is in the line of justice and not of vengeance. The laws of the land and the laws of God have been ruthlessly violated. The rights of personal liberty and security have been invaded and a life has been taken.

For taking this life the prisoners at the bar are on trial, and on this jury devolves the duty of ascertaining what is the offense, and are the prisoners the offenders. Whatever the offense may be found to be, if the prisoners are not the offenders they will be set free; if they are found to be the offenders, the majesty of the law must be maintained and crime punished.

The indictment charges the prisoners at the bar with the offense of murder. Such an indictment, if the offense be proved, would sustain a conviction for murder of the first degree, murder of the second degree or manslaughter, as the facts and circumstances in the case might warrant.

It becomes necessary, therefore, to define the several offenses or grades of offenses, so you may not err in the conclusion you arrive at, if you find an offense was committed.

At common law, murder is described to be where a person of sound memory and

discretion unlawfully kills any reasonable creature in being and under the peace of the Commonwealth, with malice aforethought, expressed or implied.

It is alleged on part of the Commonwealth that Herman Umberger, late of this county, was a reasonable creature in being and in the peace of the Commonwealth, on the 27th day of February last, and was killed. If you find this to be so, the next question is, who killed him? The Commonwealth charges the offense upon the prisoners at the bar.

The burden is upon the Commonwealth to satisfy you beyond a reasonable doubt, by evidence produced, that the prisoners killed him; and must also by like proof, show that they killed him with malice aforethought, either expressed or implied, in order to convict of the offense

OF MURDER.

Every killing is not necessarily murder—but every killing of man by man is homicide.

Homicide may be felonious, excusable or justifiable. We have to do in this case with felonious homicide; so the indictment charges the offense, designating it in the indictment as murder; and, on this indictment, if a proper case be established to satisfy a jury of the offense, and the persons who committed it, there can be a finding of murder of the first degree, or murder of the second degree or manslaughter.

The distinguishing criterion of murder is that of malice aforethought. Manslaughter is the unlawful killing of another without malice expressed or implied. There must be an unlawful homicide to constitute either murder or manslaughter. The distinction between the two grades is, that an unlawful homicide with malice aforethought, expressed or implied, is murder; whereas, an unlawful homicide without malice aforethought is manslaughter.

Keeping this distinction in mind, you inquire whether the offense committed was murder or manslaughter. Murder at common law embraces cases where no intent to kill existed but where the state or frame of mind, termed malice, in its legal sense, prevailed; and it includes all unlawful killing under circumstances of depravity of heart and a desperation of mind regardless of social duty, but where no intention to kill exists.

I have already said the distinguishing criterion of murder is malice aforethought. A particular ill will, a spite or a grudge is ordinarily understood as malice, but malice as it appears in the definition of murder, is a legal term; it comprehends not only ill will, but every case where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty.

Under all the evidence and circumstances surrounding the killing, your first inquiry should be, was the killing murder?

The testimony of Ella Stearn, Mrs. Umberger, Nannie Horner and Dr. Walker, if believed, shows that Umberger on the night of the 27th of February last, was killed by two men, who entered his dwelling by night for the purpose of committing a felony, and that he was both robbed of a large sum of money and killed by means of a deadly weapon used upon his person at a vital part, and his dead body was identified and death from the gun shot wound established, if the evidence is believed.

The Commonwealth alleges the killing as testified to by the witnesses named and the defense do not deny that Umberger was both robbed and killed by some persons. If the jury from all the evidence find the homicide was not committed in self defense, as to which no evidence appears, or not by misadventure or upon heat and passion, upon a sudden quarrel, or by accident or mistake, as to which no evidence appears, but find that life was cruelly, wilfully, wickedly and recklessly taken in total disregard of social duty and when attempting to commit robbery, after demanding, "your money or your life," they will be warranted in finding that the homicide was murder.

There is no evidence in the case to bring it within the definition of manslaughter, as we view the evidence. If you could on the evidence find it to be an unlawful homicide without malice aforethought, it would be manslaughter. If you find it to be murder, was it of the first or the second degree?

The laws of Pennsylvania distinguish murder in two degrees; murder of the first and murder of the second degree; murder of the first degree is where a deliberate intention to kill exists; murder in the second degree is where no intent to kill exists. The jury under the statute, if they find a verdict of guilty of murder, must find and ascertain whether it be murder in the first or in the second degree. The 74th section of the statute of 31st March 1860, reads:

"All murder which shall be perpetrated by means of poison, or by lying in wait or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or an attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree, and the jury before which any person

indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder in the first or second degree."

It is not the mere killing of a person in the perpetration or the attempted perpetration of a robbery or burglary that constitutes the offense of murder in the first degree. The killing while engaged in perpetrating or attempting to perpetrate a robbery or a burglary in order to constitute murder in the first degree, must be such as at common law would have been murder; that is, it must have been a killing with malice aforethought.

If, from all the facts in proof attending the killing, the jury can fully, reasonably and satisfactorily infer the existence of the intention to kill and the malice of heart with which it was done, they will be warranted in so doing. Judge Agnew, one of our ablest judges, held that: "He who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an axe, gun, knife or pistol, must in the absence of qualifying facts, be presumed to know that his blow was likely to kill, and knowing this he must be presumed to intend the death which is probable and ordinary consequence of such an act. He who uses a deadly weapon without a sufficient cause of provocation must be presumed to do it wickedly and from a bad heart."

Therefore, gentlemen of the jury, he who takes the life of another with a deadly weapon and with a manifest design thus to use it upon him, with sufficient time to deliberate, and while engaged in perpetrating or in attempting to perpetrate a robbery or burglary is guilty of murder in the first degree. All murder not of the first degree is necessarily murder of the second degree. You alone are the tribunal that must determine whether the offense is murder of the first or second degree or manslaughter, in the light of the law, on the evidence heard.

Passing from the law the question to be determined is, was Herman Umberger, on the 27th of February last, killed by the prisoners at the bar?

That he was killed, and the manner in which he was killed, was established by the testimony of Ella Stearn, Mrs. Umberger and Nannie Horner, Dr. Walker and Henry Rauch.

The inquiry you make does not take the form of who killed him, but did the defendants kill him?

Does the testimony point out the prisoners at the bar as the men?

The evidence is so voluminous I can only call your attention to the material substance of it as given by each witness, leaving you who are the only judges of it to find on all the evidence whether the prisoners committed the offense. Ella Stearn, Mrs. Umberger and Nannie Horner, the little girl, saw two persons enter the house at night, sit down at the stove for a while, and after some talk begin to search the house, alleging they were doing so by virtue of a search warrant. They detail at length and particularly the manner of search, the robbery and the homicide. Each one of these witnesses in turn stating all she saw and heard.

Some of them say the men wore one of them, gun boots, the other, leather boots. All of them say one was taller than the other; that one was masked or had on a false beard and a hat; the other two, handkerchiefs tied over the face in the manner by them described, leaving part of the face above the mouth, exposed; the nose, eyes, forehead and part of the cheeks were exposed.

Ella Stearn and Nannie Horner describe the hat and say it had a piece out of the rim at the time it was worn in the house; all say one of the handkerchiefs was a red one with small white spots; all describe it as a brown hat.

The witnesses describe the overcoats then worn; one as a dark or brownish one, the other as a grayish one. The little girl says the gray coat worn by one had a little brown patch on the side. Could she have seen the coat at the hearing at Rauch's—was it there—had she never seen it but at the homicide; each one details how she came to observe what she saw.

Neither of them knew the parties at the time. The girls say that at the hearing before Squire Rauch they saw the constable pull a red handkerchief with white spots from the hip pocket of David Nicely, and they identify it as one worn that fatal night, and the girls on the stand in court undertake to identify the handkerchief, and the hat, and the coats and including the widow, they say the prisoners at the bar are the men who did the robbing and killing.

You have heard all they said, and will consider it in connection with all other evidence in the case.

Each says the little man had the hat on, and the larger one his face tied up. Each of them undertake in court to identify the prisoners; how they come to identify the men you have heard in the evidence, and you will consider it. The old lady is not certain about the handkerchief, and did not see the break in the rim of the hat.

[His Honor here reviewed the remainder of the important testimony at considerable length.]

Having instructed you as to the law relating to the offense and having called your attention to the evidence, we now instruct you on the law of the evidence. The prisoners set up the defense of an alibi. They allege that they were at a different and distant place at the very time of the homicide; and for some time immediately preceding and after, and that therefore they not only did not commit the offense, but by no possibility could have committed it at the time and place where the homicide was committed. They agree that as one body

can not occupy two inconsistent positions at the same time, they could not have been at the Umberger house in Somerset county, at from 7 to 8 o'clock, on the evening of the night of the 27th of February, and at the same time in Westmoreland county, at as much as 13 to 15 miles remote from the Umberger house. And that therefore, notwithstanding the testimony of the Commonwealth, as which it endeavors to identify them as the persons who committed the offense, that the Commonwealth's witnesses must be mistaken as to the identity of the parties who committed the homicide and therefore they should be acquitted.

It won't be denied that if the accused have successfully shown that at the time of the homicide they were really in another place sufficiently remote from the scene of the offense, so that they could not possibly have been present, then the conclusion would be irresistible that they could not have committed the offense.

It is undoubted law that an alibi is as much of a traverse of the crime charged, as any other defense, much, however, depends on the strength of the alibi. The stronger the evidence of the truth of the alibi, the more irresistible will be the conclusion of innocence, but, the time relied on to establish the alibi should correspond closely with the time of the commission of the crime, so as to show that the accused party could not have been at the place where the offense was committed. Or the evidence of the alibi should be so strong, taken in connection with all the evidence, as to raise a reasonable doubt of the presence of the accused parties at the homicide. That is, though the proof of the alibi should not be clear, yet if the proof tends to establish an alibi, this, with all the other facts in the case, if it raise a reasonable doubt, would acquit.

In cases where the Commonwealth rests upon positive and undoubted proof, tending to prove guilt, it should not be overcome by less than full, clear and satisfactory evidence tending to prove the alleged alibi.

The burden of proving guilt lies on the Commonwealth and is at no time shifted; hence, the Commonwealth must satisfy the jury of guilt beyond a reasonable doubt. All the evidence which tends to establish an alibi and that which tends to disprove it is for the jury and the jury alone.

The inquiry into an alleged alibi involves time, place and person, as well as the credibility of the witnesses and the reasonableness of the alibi set up. The jury are to consider whether the alibi as to time is made out, for, it might happen, that the fact of the parties presence at a certain place on a certain occasion may be true, yet there may be a mistake as to time. The jury must consider the alleged time of the homicide, and the alleged presence of the prisoners at the same time, and ascertain whether any one is mistaken; this they must do however on the evidence.

An alibi when duly established is one of the most decisive defenses; but the evidence adduced to support the alibi requires to be minutely considered. The difference in time pieces, and the transit from one place to the other, and distance apart, and whether the alleged transit was on foot must be considered. You should consider:

1. The time when the homicide was committed.

2. The time of the alleged alibi. Was the alibi proven by credible witnesses, speaking the truth? Are witnesses who testify as to seeing the defendants at the places named thoroughly truthful and certain as to the time, or may they be mistaken as to the time; and are the witnesses to the homicide certain as to the identity of the parties? An alibi is a defense like any other defense, but it is often abused. It may be founded in falsehood, and when it is it should fail. It may be founded in truth, when it is, it becomes as strong negative evidence as can be offered, and when well established should prevail and acquit.

The weight to be given an alibi, I repeat, is solely a question for the jury, who should examine all the evidence bearing upon it with caution, and then on the evidence of the alibi and the evidence of the whole case, giving the prisoners the benefit of the doubt, if any exists, determine the guilt or innocence of the accused.

An eminent physician and surgeon testified as to the health and physical condition of David Nicely from the time he was imprisoned until now, and says that as a physician, he is able to say that the affliction is one that must have existed before the time of the offense. He tells you the effect it has upon him and upon his powers of work and endurance and the effect fast walking or running might have. The jury are to look at the evidence of the doctor as that of an expert in his calling, in connection with all the evidence in the case and give it such weight as, in their opinion, it should have. You are not bound to act upon it to the exclusion of other evidence, but give it just weight, and determine from all the evidence in the case, whether David Nicely could or could not have been at the place at the time, as one of the perpetrators of the homicide. The persons who testified were all competent witnesses under our laws. The defendants are made competent by statute. The credibility of the witness is for you alone.

You take into consideration the testimony of the witnesses in the case, and thoroughly to parties, the consistency of their statements, and the substance of their testimony, with all the other facts and circumstances, and determine the truth by its just weight.

Outside of the testimony of the witnesses who were present and maintained the defendants the Commonwealth has sought to connect the present circumstantial evidence. When the final charge is to be proved by substantial evidence, the proof should only consistent with the present, but it should be inconsistent with other rational conclusion, which inculcate the prisoners as absolutely incompatible with the presence of the accused party, able of explanation upon any hypothesis than that of guilt; they produce in effect a reasonable certainty that the accused and else committed the offense charged.

The counsel have invoked the presumption of innocence as a shield. They presume every man charged with commission of an offense and this legal presumption also protects him until the proof establishes guilt of the offense charged in the indictment, and unless the guilt beyond a reasonable doubt. The burden of proof is on the Commonwealth, who are to prove the material allegations of the indictment, so as to satisfy the jury the whole case beyond a reasonable doubt. If this is not done it should acquit. If the guilt has been established beyond a reasonable doubt, the jury should convict.

It is not the rule that there be acquittal in all cases of doubt; it requires a reasonable doubt to acquit, to acquit, should be a grave and substantial as to prove the mind of the juror entertained long and anxious uncertainty a verdict he should give. Thus a reasonable doubt, not just all possible or imaginary doubt, but proof as excludes every reasonable hypothesis, except that which is supported. It is that state of mind which after the entire cognate consideration of the evidence, in the minds of the jurors in that case, that they cannot say they feel convinced, to a moral certainty, of the charge, but absolute certainty required.

Chief Justice Agnew says: "A reasonable doubt must be an honest, conscientious difficulty in believing one merely subtle and ingenious must arise out of the evidence; it be fanciful nor be conjured up by consequences; it must strike with such force as to compel the yielding belief."

In conclusion, gentlemen of the jury on the indictment, the verdict rendered by you should be based on evidence, and it must specify the degree of the homicide. Not a moment thought the offense of manslaughter, as you will probably conclude under the definition of "Was it murder? If so, you are whether it was murder of the first or murder of the second degree. If the prisoners have not been proven beyond a reasonable doubt, a verdict would be generally "not guilty" you find them guilty, your verdict be either "guilty of murder in the first degree" or "guilty of murder in the second degree." The case is left to the evidence, which you consider for yourselves, and listen to as to any opinion of the evidence, for it expresses your own opinion; you are left free to decide for yourselves.

The following points submitted to the jury by the learned counsel for the Commonwealth were approved:

COMMONWEALTH
VS.
JOSEPH AND DAVID NICELY.
The Court is respectfully advised that the jury as matter of law as follows:
1. That the defendants are persons innocent of the crime with which charged, and this presumption, until it is overturned by evidence of the Commonwealth, which shows the guilt of the defendants beyond a reasonable doubt. Affirmed.
2. That a reasonable doubt is a case which after the entire cognate consideration of all the evidence, in the minds of the jurors in that case, that they cannot say they feel convinced, to a moral certainty, of the charge. Affirmed.
3. That the charge in this case, defendants are guilty of murder in the first degree, the Commonwealth is bound to prove the guilt of the accused with the evidence of the accused must be established beyond a reasonable doubt, and if the comparison of all the evidence, there is reasonable doubt of the guilt of the defendants, then they are entitled to acquit. Affirmed.
4. That it is the duty of the jury in this case to make out a rational feature of the crime with which the defendants are charged, and not to prove beyond a reasonable doubt that the crime of murder was committed, but that the defendants are guilty of the crime, and if all the evidence in the case, there is a reasonable doubt of the guilt of the crime by the defendants, then they are entitled to acquit.

The following points submitted to the jury by the learned counsel for the prisoners were approved:

PRISONERS
VS.
JOSEPH AND DAVID NICELY.
The Court is respectfully advised that the jury as matter of law as follows:
1. That the defendants are persons innocent of the crime with which charged, and this presumption, until it is overturned by evidence of the Commonwealth, which shows the guilt of the defendants beyond a reasonable doubt. Affirmed.
2. That a reasonable doubt is a case which after the entire cognate consideration of all the evidence, in the minds of the jurors in that case, that they cannot say they feel convinced, to a moral certainty, of the charge. Affirmed.
3. That the charge in this case, defendants are guilty of murder in the first degree, the Commonwealth is bound to prove the guilt of the accused with the evidence of the accused must be established beyond a reasonable doubt, and if the comparison of all the evidence, there is reasonable doubt of the guilt of the defendants, then they are entitled to acquit. Affirmed.
4. That it is the duty of the jury in this case to make out a rational feature of the crime with which the defendants are charged, and not to prove beyond a reasonable doubt that the crime of murder was committed, but that the defendants are guilty of the crime, and if all the evidence in the case, there is a reasonable doubt of the guilt of the crime by the defendants, then they are entitled to acquit.